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I. Introduction

Following the United States Supreme Court's most recent ruling on the true threats doctrine in *Virginia v. Black*,[1] significant conflict emerged among the federal circuit courts. The primary issue was whether the First

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1. 538 U.S. 343 (2003).

Amendment, as the Court interpreted in *Black*, requires a subjective intent standard to be read into all statutes that criminalize true threats, or whether the First Amendment only requires the prosecution to demonstrate that a reasonable person would consider the message to be a true threat. A number of high-profile cases involving threatening Internet communications have renewed the public dialogue about the limits of Internet speech freedom and the role of examining intent to distinguish between protected political speech and unprotected threats.

During the summer of 2012, as President Barack Obama pursued his reelection bid, cascades of tweets replete with varying levels of vitriol drew the attention of the United States Secret Service.[2] As a result, two Twitter users were prosecuted under a federal statute prohibiting threats against the President of the United States.[3] The factual circumstances in each case, and the context in which the Twitter posts appeared, raised significant questions regarding each defendant's subjective intent to intimidate or threaten the President.[4] But neither law enforcement nor the courts have treated the seemingly crucial issue of subjective intent uniformly. Following the investigations, Secret Service spokesman Brian Leary acknowledged that "[the Secret Service has] the right and certainly the obligation to determine a person's intent" with regard to threats posted on social media.[5]

Less than one month before the arrests in the Presidential threats cases, the United States Court of Appeals for the Sixth Circuit strongly stated in *United States v. Jeffries* that the *subjective* intent of the speaker "had nothing to do with" the analysis of a true threat.[6] In June 2013, the United States Court of Appeals for the Second Circuit, in *United States v. Turner*, similarly upheld an *objective* intent standard under a federal statute that prohibits communicating threats to a federal judge.[7] Prior to *Black*, the Ninth Circuit had departed from the purely objective standard for true threats in *Planned Parenthood v. American Coalition of Life Activists*.[8] Today, the Ninth Circuit remains one of the only federal circuit courts that

2. Robbie Brown, *140 Characters Spell Charges and Jail*, N.Y. TIMES, July 12, 2013, *available at* http://www.nytimes.com/2013/07/03/us/felony-counts-and-jail-in-140-characters.html?_r=0.

3. *Id.*

4. *Id.*

5. *Id.*

6. United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2013) (applying 18 U.S.C. § 875(c)), *cert. denied* 134 S. Ct. 59 (Oct. 7, 2013).

7. United States v. Turner, 720 F.3d 411, 426–27 (2d Cir. 2013) (applying 18 U.S.C. § 115(a)(1)(B)).

8. Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1071 (9th Cir. 2002).

require a finding of a subjective intent to intimidate in order to sustain a conviction in all true threats cases.[9]

In June 2014, the Supreme Court granted certiorari in *Elonis v. United States*, a case arising out of the Third Circuit, which promises to clarify the issue of whether the First Amendment requires courts to consider the subjective intent of the speaker to uphold a conviction under all true threats statutes.[10] The facts of the case detail how Anthony Elonis, an estranged husband, allegedly threatened his wife through Facebook posts that included his own violent amateur rap lyrics and references to off-color sketch comedy posted to YouTube that, ironically, referred to the First Amendment criminalization of threats against the President.[11] Elonis argued in the petition for certiorari that the "inherently impersonal nature of online communication makes [online] messages inherently susceptible to misinterpretation"[12] and that "modern media allow personal reflections intended for a small audience (or no audience) to be viewed widely by people who are unfamiliar with the context [surrounding the communication]."[13] Elonis argued further that the trial court misread *Black* and failed to instruct the jury to consider his subjective intent consistent with the First Amendment.[14]

This article explores these divergent applications of the true threats doctrine, and specifically examines the subjective intent and objective speaker-listener standards in cases involving threats transmitted over the Internet. The discussion focuses on federal court cases that both highlight and downplay media context in an attempt to protect advocacy interests of speakers—especially those who use abstract, inflammatory speech on interconnected social media platforms. Part II discusses the origins of the true threats doctrine and its relevance to recent and well-publicized cases involving Internet communications. Part III reviews the relevant scholarly literature regarding the confusion in true threats jurisprudence, the divergence of opinion regarding the correct legal standards for true threats,

9. *See, e.g.*, United States v. Cassel, 408 F.3d 622, 627–33 (9th Cir. 2005) (interpreting the plurality opinion in *Black* as requiring a subjective intent standard); United States v. Stewart, 420 F.3d 1007, 1016–19 (9th Cir. 2005) (applying a subjective intent standard to sustain a conviction for a threat made against a federal judge); United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011) (affirming the Ninth Circuit's interpretation of *Black* that the First Amendment requires the prosecution to prove that the defendant subjectively intended to threaten another in order to sustain a conviction under all true threats statutes).

10. *See* United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted* 82 U.S.L.W. 3538 (U.S. June 16, 2014) (No. 13-983).

11. Petition for Writ of Certiorari at *4–14, *Elonis*, 730 F.3d 321, 2014 WL 645438 (No. 13-983).

12. *Id.* at *34.

13. *Id.*

14. *Id.* at *14–16, 25–32.

and the importance of context in interpreting a threatening Internet message. Part IV analyzes relevant case law within a methodological framework designed to examine the federal courts' reliance on various contextual factors in interpreting Internet speech. This article will also highlight the importance of reformulating the true threats doctrine under a totality of the circumstances approach that holds to the doctrine's origins and accounts for emerging modes of interpersonal communication. The article will then conclude by discussing the issues raised by the Supreme Court's forthcoming reexamination of the true threats intent requirement in *Elonis*. This case could either offer long-awaited clarity or raise further concerns for speakers who frequently engage in violent Internet speech that could be intimidating but do not intend to threaten a specific individual or group.

II. Origins of the True Threats Doctrine and Key Cases of Internet Threats

Prior to the emergence of the Internet, in-person communication, radio, and television broadcast were the only available outlets for live public address. Threats aimed at political targets, as opposed to average citizens, required some physical assemblage of people, access to broadcast technology, or the use of more traditional forms of correspondence. Nowadays, Twitter, Facebook, YouTube, and other social media platforms provide direct access to public officials (many of whom develop and desire an online presence) and create instant, and often mobile, public forums. Political speech, even in simple forms of direct public address, frequently involves complex messages that may involve innuendo, metaphor, satire, sarcasm, and occasionally violent calls for action. The difficulty in interpreting these intricacies is only exacerbated in Internet-based communications, but the principles in the doctrine remain foundational. Before addressing the nuanced nature of political rhetoric as Internet speech, the discussion must first outline some cases and statutes that underscore the true threats doctrine and the distinction between protected speech and unprotected threats.

The federal statute prohibiting threats against the President of the United States is "of an ancient vintage."[15] Title 18, section 871 of the United States Code traces its policy origins from the English Statute of Treason,[16] through the passing and eventual repeal of the Alien and Sedition Act and to the statute's modern iteration, enacted in 1948.[17] The federal

15. Watts v. United States, 394 U.S. 705, 709 (1969) (Douglas, J., concurring).

16. Note, *Threats to Take the Life of the President*, 32 HARV. L. REV. 724, 725 (1919).

17. *See Watts*, 394 U.S. at 710 (Douglas, J., concurring).

statute criminalizing threats against the President had been in force for nearly forty years by the time defendant Robert Watts, in *Watts v. United States*, uttered the antiwar protestations that allegedly threatened the life of President Lyndon B. Johnson, and set the groundwork for the modern true threats jurisprudence.[18] Watts was indicted and convicted under section 871.[19] As the United States Armed Forces had become increasingly entrenched in the war in Vietnam, domestic political and social tensions had escalated steadily and the resulting protests took varying forms.[20] The unrest that marked the antiwar protest movements in the 1960s stirred emboldened antiwar advocates whose messages sometimes intimated violence toward government officials.[21] Watts's rhetoric was not atypical for the Vietnam-era protest climate, but his First Amendment challenge to Section 871, as applied to his remarks, ushered in the "true threats" doctrine in an unusual way.

In 1969, without hearing oral arguments,[22] a divided Supreme Court held in *Watts* that political hyperbole, even though it is often "vituperative, abusive, and inexact," is distinguishable from a true threat and is protected under the First Amendment.[23] The Court's principal distinction between political hyperbole and a true threat has become the First Amendment bedrock for the true threats doctrine, which has been applied to conduct ranging from cross burnings to YouTube posts.[24] In the years since *Watts*, the federal circuit courts have encountered significant challenges in applying the abstract true threats doctrine to nuanced factual circumstances. The Ninth Circuit has remarked that "[t]he Supreme Court has provided benchmarks, but no definition" of true threats.[25] True threats cases often involve civilian targets, and occasionally involve threats against the President or other federal officials. Moreover, the public policy interests differ when the doctrine is applied to threats against public officials rather

18. *Id.* at 706 (per curiam) (emphasis added) (describing a rally held at the Washington Monument, where Watts stated to the crowd: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. *If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.*").

19. *Id.*

20. *See* Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 990–92 (1968).

21. For a general discussion of violent antiwar protests, see Doug McAdam and Yang Su, *The War at Home: Antiwar Protests and Congressional Voting, 1965 to 1973*, 67 AM. SOCIOLOGICAL REV. 696 (2002).

22. *Watts*, 394 U.S. at 711 (Fortas, J., dissenting).

23. *Id.* at 708.

24. *See* Virginia v. Black, 538 U.S. 343 (2003); *see also* United States v. Jeffries, 692 F.3d 473 (6th Cir. 2013).

25. Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1071 (9th Cir. 2002).

than private persons. Nevertheless, in both rhetorical areas, courts must balance political and social speech interests against the harm that the speech inflicts regardless of the target's official status. Therefore, an analysis of the political and social advocacy interests asserted in the allegedly threatening communication can contribute to the discussion of the doctrine in equal measure.

The Supreme Court most recently discussed the true threats doctrine in *Virginia v. Black*, where two defendants were convicted separately of violating a Virginia cross-burning statute aimed at protecting classes of people who had been targeted by extremist groups like the Ku Klux Klan.[26] The Court ruled, in a plurality opinion, that the Virginia statute was unconstitutionally overbroad because it treated the act of cross burning as *prima facie* evidence of intent to threaten, which risked chilling protected core political speech.[27] Justice O'Connor, writing for the plurality, acknowledged that "'[t]rue threats' encompass those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence" toward the target.[28] Some commentators and courts have interpreted Justice O'Connor's use of the phrase "means to communicate" to indicate that the First Amendment *requires* courts to examine the defendant's subjective intent.[29] Others have argued that the phrase indicated only that the communication must be intentional and not accidental or coerced.[30] The constitutional uncertainty arising from *Black* has split federal circuit courts' interpretations regarding the constitutionality of intent standards and the First Amendment significance of media and cultural context in the assessment of true threats.

Although the Ninth Circuit decided *Planned Parenthood v. American Coalition of Life Activists* one year before *Black*, the former illustrates how cases involving widespread Internet communications can pose deeply contextual issues and command massive public attention.[31] *Planned Parenthood* involved a series of publicly distributed, hard-copy "WANTED" and "GUILTY" posters and a website known as the

26. *See Black*, 538 U.S. at 348.

27. *Id.* at 364–65.

28. *Id.* at 359 (emphasis added).

29. *E.g.*, Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1348 (2006); United States v. Bagdasarian, 652 F.3d 1113, 1122 (9th Cir. 2011).

30. *E.g.*, Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 55 SUP. CT. REV. 197, 216 (2003); W. Wat Hopkins, *Cross Burning Revisited: What the Supreme Court Should Have Done in Virginia v. Black and Why It Didn't*, 26 HASTINGS COMM. & ENT, L.J. 269, 308–09 (2004).

31. *See generally* Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1071 (9th Cir. 2002).

"Nuremburg Files."[32] The website identified physicians who performed abortion services and indicated whether they were actively working, wounded, or killed.[33] The Ninth Circuit, sitting en banc, voted 6-5 to uphold a jury verdict in favor of Planned Parenthood and the physicians.[34] Although the defendants argued that their Internet posts were protected as abstract political advocacy, invoking the lineage of First Amendment incitement cases, the Ninth Circuit applied the true threats doctrine.[35] The court held that the posters and the website, viewed in their full context and to the extent that they intended to threaten the appellants, were true threats and thus unprotected by the Constitution.[36] In this respect, the facts in *Planned Parenthood* challenged the Ninth Circuit to determine whether the posters and the website, in light of their cultural and media context, amounted to a true threat lacking any protection under the First Amendment.[37]

The Second and Sixth Circuits have recently analyzed cases involving threatening communications about judges, which the defendants transmitted through a publicly available Internet blog and posted on YouTube and Facebook, respectively.[38] In each case, the court (including dissents) assessed the extent to which the defendant's language and choice of medium indicated proscribable threatening behavior.[39]

True threats cases commonly hinge on whether the jurisdiction adopts the subjective intent of the speaker standard or the objective understanding of the recipient standard. As such, *Jeffries* and *Turner*,[40] viewed alongside

32. *Id.* at 1065–66.

33. *Id.*

34. *Id.* at 1062–63.

35. The incitement doctrine is related to the true threats doctrine in that it punishes speech that is likely to result in or encourage immediate harm to others. The First Amendment protects abstract political advocacy—even the advocacy of violence—so long as the advocacy does not amount to incitement of "*imminent lawless action.*" Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also Planned Parenthood*, 290 F.3d at 1092 (Reinhardt, J., dissenting) (finding that "[t]he majority cite[d] not a scintilla of evidence . . . that plaintiffs or someone associated with them would carry out the threatened harm," and indicating that Judge Reinhardt would have decided *Planned Parenthood* under the incitement test).

36. *Planned Parenthood*, 290 F.3d at 1088 (majority opinion).

37. *Id.* at 1072 (rejecting the ACLA's argument that the posters and website were political speech under *Watts*, and could not lose the character of protected political speech by context).

38. *See* United States v. Turner, 720 F.3d 411, 413 (2d Cir. 2013) ("On June 2, 2009, Harold Turner published a blog post declaring that three Seventh Circuit judges deserved to die for their recent decision that the Second Amendment did not apply to the states."); United States v. Jeffries, 692 F.3d 473, 475–77 (6th Cir. 2012) (describing a music video that Franklin Delano Jeffries II posted on YouTube containing "the menacing (threats to kill the judge if he doesn't 'do the right thing' at an upcoming custody hearing)").

39. *See Turner*, 720 F.3d at 420–25; *Jeffries*, 692 F.3d at 478–83.

40. *See Turner*, 720 F.3d at 434 (Pooler, J. dissenting) (observing that Turner's comments were political advocacy, and that "[t]his reading is furthered by the fact that Turner's words were posted on a blog on a publicly accessible website").

Watts, *Black*, and *Planned Parenthood*, illustrate the significance of analyzing the media used to transmit violent communications to others for the sake of potentially protected social and political purposes. The debate over the subjective intent and objective intent standards has persisted in the case law among judges, in the literature among scholars, and has now ripened for Supreme Court review in *Elonis v. United States*. Few commentators have dealt with the practical effect of the speaker's chosen medium on the objective interpretation of the message's political or threatening content, its actual effect on the recipient, or the question whether the Supreme Court should recognize choice of media as a key component of contextual analysis under *Watts* and the First Amendment.[41] Federal court cases arising after *Black* that implicate the true threats doctrine as applied to online messages illustrate the profound cultural and First Amendment issues with which the Supreme Court must grapple as it hears *Elonis* during the upcoming fall term.[42]

III. Literature Review

The majority of the literature reviewed for this study on the development of the true threats doctrine since *Black* has focused on two related issues: (1) whether the First Amendment requires courts to consider a speaker's subjective intent to intimidate the target of the communication in addition to finding that the communication is objectively threatening on its face; and (2) if the First Amendment requires inquiry into the speaker's subjective intent, what weight courts should give to the medium of communication and related contextual factors in light of the limited guidance the lower courts received from the Supreme Court in *Black*. The Supreme Court has already recognized the complexity inherent in regulating the Internet—a simultaneously interpersonal and widespread mode of communication.[43]

The Supreme Court has offered relatively little guidance, however, regarding the definitions of, and distinctions between, true threats and political advocacy. As such, several commentators have questioned whether the true threats doctrine requires further reformulation to accommodate free speech concerns that accompany technological

41. Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

42. *See* United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 82 U.S.L.W. 3538 (U.S. June 16, 2014) (No. 13-983).

43. *See* Reno v. ACLU, 521 U.S. 844 (1997). In *Reno*, Justice Stevens characterized the Internet from the publisher's point of view as "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Id.* at 853. *See infra* Part III.A. for commentators' discussion of the relative importance of Internet context in true threats cases.

innovation and new communicative contexts.[44] In light of the myriad contextual interpretations that juries and judges can make of Internet communications, commentators have demanded clarity on the issue along with more guidance from the Court on interpreting the social meaning of violent Internet speech. This section traces the scholarly dialogue surrounding the appropriate constitutional intent standard for the true threats doctrines. It also addresses some of the complex issues raised by including the mode of communication as a relevant contextual factor in upholding or overturning true threats convictions.

A. Subjective Intent: An (Additional) Standard Post-*Black*?

Kenneth Karst has explained that one settled element in the constitutional true threats jurisprudence is that a "true threat" must be objectively threatening: The prosecution must prove either that a reasonable speaker would anticipate that the message would cause fear or intimidation, or that an objectively reasonable listener would interpret the message to communicate a threat of bodily harm or death.[45] *True* threats are, by definition, objectively threatening.[46] If a true-threats test lacked an objective requirement, it would be an "intolerable intrusion on free speech" because it would render potentially valuable speech unprotected by the First Amendment solely because of its impact on a single recipient.[47]

Frederick Schauer has challenged whether the First Amendment requires a finding of general or specific intent on behalf of the speaker to support a conviction of a true threat.[48] Acknowledging that the cases involving true threats are unclear, Schauer indicated that precedent did not bound the Supreme Court in *Black* to hold that the speaker must

44. *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 316 (2001) (discussing the proliferation of scholarly attention surrounding the true threats doctrine in the Internet age); *see also* John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement That Threatens*, 8 TEX. J. WOMEN & L. 207, 240–41 (1999) (describing the greater impact of threats law on the Internet as opposed to on other mediums); Anna S. Andrews, *When Is a Threat "Truly" a Threat Lacking First Amendment Protection? A Proposed True Threats Test to Safeguard Free Speech Rights in the Age of the Internet*, UCLA ONLINE INST. FOR CYBERSPACE L. & POL'Y (1999), *available at* http://www.gseis.ucla.edu/iclp/aandrews2.htm (describing the unique ease of conveying threats on Internet media); Jeremy C. Martin, Note, *Deconstructing "Constructive Threats": Classification and Analysis of Threatening Speech After Watts and Planned Parenthood*, 31 ST. MARY'S L.J. 751, 779–80 (2000) (describing the unique potential for the Internet to be a vehicle to convey threats and harassment).

45. Karst, *supra* note 29, at 1348.

46. *Id.*

47. *Id.*

48. Schauer, *supra* note 30, at 216.

subjectively intend to intimidate the target in order to be guilty of communicating a true threat under the First Amendment.[49]

Schauer emphasized that convictions in all criminal cases rest on the prosecution's demonstration of a perpetrated harm, the defendant's intent to perform the act that caused the harm, and the demonstration of some reprehensible *mens rea*.[50] Schauer proposed that an intent analysis is impliedly built into all criminal true threats statutes, which renders a specific First-Amendment-based intent requirement "superfluous."[51] Furthermore, the First Amendment case law includes numerous examples of statutes that proscribe expressive conduct, regardless of the speaker's specific intent, and harm-based rationales for restrictions on speech routinely survive constitutional scrutiny.[52] Schauer's provocative piece traced the confusion in the true threats doctrine to the failure of the *Black* court to articulate the linguistic or expressive features of a message that distinguish a true threat from other communications of protected abstract, though violent and harmful, ideas.[53] He suggested that the Supreme Court had interpreted the purpose of the true threats doctrine in divergent ways from its announcement of the doctrine in *Watts* to its most recent discussion in *Black*.[54] He then concluded that *Watts* explained, by briefly explicating the concept of political hyperbole, what a true threat is *not* rather than providing a usable definition or test to determine what a true threat *is*.[55] The misunderstanding of the threatening features of harmful speech opened the true threats doctrine to divergent First Amendment treatment based on differing judicial interpretations of linguistic and contextual factors.[56]

W. Wat Hopkins similarly concluded that the Supreme Court in *Black* failed to clarify the distinction between protected ideological advocacy and unprotected threatening speech.[57] According to Hopkins, the Court in *Black* contributed to the existing confusion surrounding the true threats doctrine, particularly with regard to inflammatory expressive conduct, such

49. *Id.* at 217–18.

50. *Id.*

51. *Id.*

52. *Id.* at 216–20 (drawing on other unprotected speech classifications such as obscenity to illustrate how intent to harm is not necessarily required to sustain a proscription on dissemination of harmful speech or material).

53. *Id.* at 213–14 (citing KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (Oxford 1989)).

54. Schauer, *supra* note 30, at 213–14 & n. 54.

55. *Id.*

56. *Id.* at 213–14 & n. 54.

57. Hopkins, *supra* note 30 at 313–14.

as cross burning, by jurisprudentially engrafting "intimidation."[58] The inclusion of "intimidation," which is an ambiguous concept, to a true threats doctrine only deters the type of speech that causes immediate fear and psychological harm.[59] Hopkins also concluded that the Court failed to settle the issue of whether the cross burning in *Black* amounted to constitutionally protected political speech.[60] Instead, the Court held that some cross burnings were protected and some were not.[61] Thus, according to Hopkins, the Court issued an unnecessary holding that simultaneously confused states that passed anti-intimidation legislation and begged for another case to clarify the true threats doctrine.[62]

In light of the Court's limited discussion of the distinctions between protected expression and unprotected true threats since the doctrine's inception, some federal circuit courts have rejected the subjective intent test for true threats and relied solely on an objective test despite *Black's* holding.[63] Commentators differ significantly on whether a subjective intent standard is required under the true threats jurisprudence at all, and the decision in *Black* has only further complicated the intent requirement under the First Amendment. Writing before the Court decided *Black*, Jennifer E. Rothman suggested that the Supreme Court should incorporate a subjective intent standard into true threats jurisprudence to avoid inadvertently applying a simple negligence standard to true threat cases.[64] Rothman noted that the Ninth Circuit shared the concern that the speech restrictive objective standard should be counterbalanced by a subjective inquiry in every true threats case.[65]

Caleb Mason described the Ninth Circuit's concern as something akin to a trailblazing application of First Amendment principles to laws governing threatening speech.[66] Reading *Black* as a doctrinal shift, the

58. *Id.* at 308–09.

59. *Id.*

60. *Id.* at 313–14.

61. *Id.*

62. *Id.* at 272–73 (2004).

63. Andrews, *supra* note 44; *see also* Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1261–62 (2006) (discussing varying interpretations of the objective standard as either a "reasonable speaker" or "reasonable listener" standard).

64. Rothman, *supra* note 44, at 316 (citing Rogers v. United States, 422 U.S. 35, 46–47 (1975) (Marshall, J., concurring) (separately writing to emphasize that, "[u]nder the objective construction by contrast, the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. In essence, the objective interpretation embodies a negligence standard . . . . We have long been reluctant to infer that a negligence standard was intended in criminal statutes.")).

65. *Id.* at 308.

66. Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 SW. L. REV. 43, 68 (2011).

Ninth Circuit held in 2011 that "the subjective test set forth in *Black must* be read into *all threat statutes* that criminalize pure speech."[67] According to Mason, if *Black* is interpreted to abrogate the objective test, as some commentators suggested,[68] it would indicate a significant departure from current First Amendment jurisprudence and the pre-*Black* guidance from other federal circuit courts that had applied purely objective standards to gauge a true threat.[69]

Commentary has also focused on the Sixth Circuit's discussion in *Jeffries* of the Ninth Circuit's interpretation of *Black* and the subjective intent requirement.[70] In *Jeffries*, the Sixth Circuit upheld its existing objective standard in true threats cases, while also noting that *Black* turned on the "overbreadth" of the Virginia cross-burning statute, and not on the question of whether the First Amendment requires a subjective intent standard alongside the objective standard.[71]

Following the *Jeffries* decision, a commentator writing for the Harvard Law Review chastised the Sixth Circuit for unwisely refusing to follow the *Black* decision, stating that the "plain language in *Black* is most reasonably read as adopting the subjective intent requirement."[72] Citing the *Jeffries* court's reliance on the Fourth Circuit's interpretation of *Black*, the article argued that one of the chief limitations of *Black*'s language was that it permitted circuits that adopt an objective, reasonable listener standard to contort the *Black* decision and ignore its clear guidance that the First Amendment requires subjective intent for a communication to amount to a true threat.[73] The article interpreted *Black* as requiring lower courts to balance subjective intent against an objectively reasonable interpretation of the allegedly threatening material to accurately assess all of the contextual complexities of communications in true threats cases.[74]

67. United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011) (emphasis added).

68. *See* Schauer, *supra* note 30, at 217 (2003) ("[I]t is plain that . . . . the *Black* majority . . . believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate.").

69. *See* Mason, *supra* note 66, at 68.

70. United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012).

71. *Id.* at 479–81 (discussing *Black* and refusing to interpret the case as requiring a subjective intent standard in true threats cases).

72. *First Amendment–True Threat–Sixth Circuit Holds That Subjective Intent Is Not Required by the First Amendment When Prosecuting Criminal Threats–United States v. Jeffries, 692 F.3d 473 (6th Cir. 2012),* 126 HARV. L. REV. 1138, 1142 (2013).

73. *Id.* at 1142–43.

74. *Id.* at 1141.

B. Subjective Intent and the Internet: The Role of the Internet in Meaning Making

Leslie Kendrick has argued that the Supreme Court has a long history of weighing harms to message recipients against the likely chilling effect that harm-based regulations might have on legitimate political and social speech.[75] The true threats doctrine attempts to strike the constitutional balance between the inherent value in freely expressing unpopular views and the state's interest in preventing psychological and emotional harms.[76] Kendrick has argued, however, that judges often rely on nothing more than empirical guesswork when interpreting the effectiveness of intent requirements through the lens of chilling effect theory.[77] Her critique supports looking toward other theoretical lenses to understand the interrelation between intent, meaning, and harm.

As social media has become commonplace, prosecutors have seen a proliferation of cases involving threatening Internet speech.[78] The emboldening of Internet speech raises additional questions regarding how participants in social media platforms create and interpret Internet messages relative to other analog communication forms. For example, are linguistic meanings supplemented, or perhaps altered, by the Internet-mediated context in which the communication appears?[79]

The literature on the impact of First Amendment principles on Internet semiotics, or meaning making, has focused on how Internet mediation creates, and sometimes distorts, speakers' intended meanings. For example, Jordan Strauss suggested that the subjectively intended harm in an allegedly threatening communication is inextricably linked to the semiotic and linguistic components experienced by the speaker.[80] Nevertheless, such a message could manifest an array of meanings based on the recipient's experience of the same symbolic and linguistic

75. *See* Leslie Kendrick, *Speech, Intent and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1648–55 (2013) (discussing how the Supreme Court has treated the intent requirement in the First Amendment cases and how the chilling effect operates).

76. *Id.* at 1643 n.36 (citing Virginia v. Black, 538 U.S. 343, 359–60 (2003)).

77. *Id.* at 1685.

78. Petition for Writ of Certiorari at *24, United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted* 82 U.S.L.W. 3538 (U.S. June 16, 2014) (No. 13-983).

79. *See* Justin Kruger et al., *Egocentrism over E-Mail: Can We Communicate as Well as We Think?*, 89 J. PERSONALITY & SOC. PSYCHOL. 925, 933 (2005).

80. Jordan Strauss, *Context Is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 SW. U. L. REV. 231, 257 (2003) (analyzing the pre-*Black* intent standard adopted in Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1071 (9th Cir. 2002), and discussing another scholar's assertion that the discipline of semiotics encourages examining the meaning inherent in the use of a particular medium); *see also* Daniel Chandler, *Strengths of Semiotic Analysis* (Oct. 11, 2014), http://www.aber.ac.uk/media/Documents/S4B/sem10.html.

components.[81] Strauss proposed that "[t]he harm from expressive conduct comes from a statement's social meaning, which is the perception of a statement as, for example, threatening danger and thus imposing social costs."[82] To punish threatening communications in a manner that supports the policy interests of the true threats doctrine, Strauss argued that the courts must interpret subjective intent through the lens of social semiotics theory and recognize that the choice of medium reflects the meaning of the underlying textual material.[83] Strauss further argued that courts should acknowledge the nature of Internet speech that frequently reaches targets without reference to the message source, thus obscuring a significant contextual element.[84]

Kathleen Sullivan has likewise asserted that the Internet eliminates middlemen who restrain potentially harmful speech.[85] In her view, the disintermediation feature of Internet communication suggests that instantly and widely available Internet content is contextually distinguishable from speech through other media.[86] Strauss, citing Sullivan, made the same observation and suggested that courts should acknowledge the nature of Internet messages that lack physical context because they are duplicated instantly and dispersed widely to diverse geographies and publics.[87]

Eric Segall conversely suggested that Internet speech maintains its contextual meaning despite dispersion and diffusion across the Web.[88] The permanence and pervasiveness of Internet content create, rather than dilute, additional contextual layers within threatening messages.[89] The public, yet anonymous, character of the Internet invites angry users to post target-identifying information wrapped in a cloak of innuendo and invective.[90] Segall suggested that construing a threat as a matter of law under the First Amendment becomes a dangerously hard case when such a context-laden communication lacks language that suggests a direct threat of imminent

81. *See* Strauss, *supra* note 80, at 257.

82. *Id.* (citing Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995)).

83. *Id.*

84. *Id.* at 256–63. For a general discussion of intermediation of Internet speech, *see* Sullivan, *supra* note 70, at 1666–80.

85. *Id.* at 1670–71.

86. *Id.*

87. Strauss, *supra* note 80, at 259–60 (citing Sullivan, *supra* note 70, at 1671.

88. Eric J. Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH L. REV. 183, 195 (2011).

89. *Id.* at 194.

90. *Id.* at 195.

violence toward a specific target.[91] Moreover, modern Internet and social media threats operate upon a pervasive and interpersonal system that "facilitates the creation of networks of like-minded persons to help carry out threats," provides dangerous associates with a safe online enclave, and adds a contextual factor that could impact the target to a greater degree.[92] The Supreme Court has, perhaps hastily, overprotected speech under the First Amendment to avoid censorship despite the unique imminence to online speech that remains online until the speaker chooses, or is forced, to remove it.[93] Some commentators have argued that true threats with political overtones require a test for imminence, but the literature on meaning-making through cyberspace indicates that interpreting politically charged threatening speech does not hinge on developing a more refined definition for imminence in Internet space.[94] Rather, such interpretation requires a test that examines the totality of the circumstances surrounding all aspects of the communication, including speaker, medium, and audience.[95]

The commentary reviewed in this section suggests that context suggests meaning, which underlies the gravity of the potential harm in threatening speech. Courts therefore should thoroughly examine all relevant contextual interpretations of a message when deciding First Amendment challenges to true threats prosecutions. Kathleen Sullivan has, however, cautioned that including media context in the traditional First Amendment analysis could lead to hasty departures from pragmatic First Amendment balancing.[96] Despite acknowledging that the Internet

91. *Id.* (discussing concerns with the *en banc* opinion in Planned Parenthood v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001), specifically that the Ninth Circuit panel attempted to create too fine a distinction between permissible abstract advocacy and impermissible direct threats).

92. Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 82 (2002).

93. *Id.*

94. *Compare* Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1331 (2005) ("The unmistakable message of Claiborne Hardware seems to be that at least in the context of threatening language with political overtones, a 'true threat' is defined by the three elements of the Brandenburg test: the words must be explicit, the words must be spoken in a context in which serious harm is imminent, and the speaker must possess the specific intent that the harm occur.") *with* Segall, *supra* note 88, at 185 ("The Supreme Court should recognize that [imminence requirements] should not be applied to threatening speech posted on the Internet where the very idea of imminence has no real relationship to the possibility of speech causing actual harm.").

95. *See generally* Amy E. McCann, *Are Courts Taking Internet Threats Seriously Enough? An Analysis of True Threats Transmitted Over the Internet, as Interpreted in United States v. Carmichael*, 26 PACE L. REV. 523, 547–48 (2006).

96. Sullivan, *supra* note 70, at 1672.

provides a contextually distinct communicative mode, Sullivan concluded that "[i]t [was] a [hard] question whether [] changes in background context should change the application of existing First Amendment norms."[97] Sullivan specifically discussed Congress' 1996 proposal to outlaw the dissemination of bomb-making information, and questioned whether the fact that such information is posted on the Internet would require courts to expand the existing First Amendment doctrine to account for a new dimension of illegal incitement.[98] Sullivan concluded that it was unclear whether posting bomb-making information on the Internet would be more dangerous than analog methods of communicating potentially hazardous information simply because the Internet allows instantaneous and wide accessibility.[99]

Despite some variation regarding the importance of E-context in true threats cases, the area remains a critical area for legal scholars concerned with doctrinal developments in the face of new technologies. The lingering questions on the importance of the Internet as a contextual factor have been thoroughly identified as problematic, but courts have rendered divergent opinions on whether and to what extent the notion of "E-context"[100] fits within established constitutional principles regarding the importance of the speaker's intent and other relevant contextual factors.

C. Summary of Scholarship

The scholarship on the potential First Amendment requirement of a subjective intent standard in true threats cases has roundly acknowledged the lack of consensus among the courts following *Black*. Due to a perceived dearth of guidance from the Court in *Watts*, however, true threats jurisprudence has yet to develop a clearly articulated test among the circuits. The circuit splits on the issue stem mainly from divergent lower court interpretations of *Black*'s discussion of the speaker's intent. Some legal scholars have suggested that *Black* merely made considerable room for the subjective intent examination rather than adopting it as a bright-line First Amendment rule. Others more strongly argue that *Black* requires examination into the speaker's subjective intent to address First Amendment concerns related to criminalizing statements that are merely objectively harmful or made negligently.

As the confusion in the true threats doctrine continues to impact public Internet speech, the divergent interpretations of *Black* raise First

97. *Id.*
98. *Id.*
99. *Id.*
100. *See infra* Part. IV.

Amendment concerns regarding the responsibility that a speaker bears for virulent expression communicated to an unknown, yet interconnected, audience. Indeed, a significant number of true threats cases involve Internet speech.[101] Some scholarly discussion has addressed how Internet communications can reflect the speaker's intent but may result in unintended consequences when the full factual context of the message is lacking and recipients feel threatened. The scholarly discussion of mediated Internet meaning suggests that Internet communications are fundamentally different from messages conveyed in person or during public gatherings because of the technical qualities of the Internet itself. Internet posts are permanently affixed in cyberspace, regardless of edits made to them, but the impact of the same posts can be retracted at the click of a button prior to delivery to any recipient. Due to the possibility of speech to become decontextualized and impersonal through third-party sharing, the online media environment tends to promote individualized readings of messages when content is experienced only by the end user rather than experienced socially during an authentic, synchronous exchange. For the purposes of threatening speech, a hyper-individualized reading of a message lacks the benefit of a true communal response, such as the laughter among the crowd in *Watts*.[102]

The issue concerning subjective intent in allegedly threatening speech post-*Black* is at the heart of *Elonis*: what did Justice O'Connor mean when she stated that true threats are statements whereby the speaker "means to communicate" a serious expression of intent to harm another?[103] In *Elonis*, the Supreme Court will address the issue of speaker's intent for the first time in an Internet speech case, and may for the first time address many of the questions raised in the legal scholarship discussed above. Ideally, the Court should address in its discussion, if not in its holding, whether an online communication is itself a contextually relevant factor and whether usage of social media impacts the intended or objective meaning of a communication. Because Internet media provide a unique contextual experience, examining how federal courts have analyzed the complexities of speaker's intent and audience interpretation of Internet messages is worthwhile to develop a richer sense of the cultural and First Amendment issues raised in *Elonis*.

101. Petition for Writ of Certiorari at *24, United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted* 82 U.S.L.W. 3538 (U.S. June 16, 2014) (No. 13-983).

102. *See* Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) (noting the reaction of the crowd gathered around the speaker).

103. Virginia v. Black, 538 U.S. 343, 359 (2003).

IV. Case Analysis

Following the Supreme Court's decision in *Virginia v. Black*, a number of federal courts subjected the case to sharply divergent interpretations regarding whether the First Amendment requires more than an objective threat in order to sustain a conviction under a true threats statute.[104] The Ninth Circuit held that the First Amendment requires courts to read a subjective intent standard into all statutes that criminalize pure speech.[105] The Fourth Circuit remains committed to its more narrow reading that *Black* does not require a showing of subjective intent to find that that the speaker made an unprotected true threat.[106] This section recounts a study of federal courts' post-*Black* First Amendment analysis of the intent standard, and the role of Internet media in the subjective intent analysis and on the objective reasonableness of a threat. This article analyzes only cases that directly discuss *Black*, as several commentators have identified *Black* as the key source of the current circuit splits on the true threats doctrine.[107] Moreover, *Black* underlies the issues on appeal in *Elonis*.[108] This article has not considered cases preceding *Black* except to the extent they provide background information regarding relevant circuit court precedent.

The cases isolated for analysis in this article focus on the lower and intermediate courts' construal of the Internet communications. I have restricted the discussion purposefully to a more specific term, "E-context" which is used throughout this article. The term E-context in the true threats context refers to online, Internet-mediated communications excluding direct communication platforms. The term encompasses multimedia and text postings to third-party hosted websites and forums, original hosted Web content, and the use of social networking applications, including, but not limited to mobile iterations of existing Internet sites. This term excludes direct Internet-mediated communications such as Skype or Face Time, which merge video and voice media for direct communication. Such platforms are not synonymous with the concept of "E-context" as the term is used here because they are intended to imitate a real-time interpersonal

104. *See* United States v. White, 670 F.3d 498, 510 (4th Cir. 2012) ("Most other circuits also continue to apply an objective test after *Black*, even though some courts focus on a 'reasonable sender' of the communication or simply a 'reasonable person' familiar with all the circumstances."); *see also* United States v. Stock, 728 F.3d 287 (3d Cir. 2013); United States v. Sutcliffe, 505 F.3d 944, 962–63 (9th Cir. 2007) (citing "contradictory case law" on the issue of intent).

105. United States v. Bagdasarian, 652 F.3d 1113, 1116 (9th Cir. 2011).

106. *See* United States v. White, 670 F.3d 498 (4th Cir. 2012).

107. Hopkins, *supra* note 30, at 308–09; *see also Sixth Circuit Holds that Subjective Intent Is Not Required by the First Amendment When Prosecuting Criminal Threats*, *supra* note 72, at 1142.

108. *See* Elonis v. United States, 82 U.S.L.W. 3538 (June 16, 2014) (order granting certiorari).

communicative experience between users and do not raise the same contextual questions for courts as asynchronous and indirect communication platforms.

A. Examining E-Context Under the Objective Test: Variation in the "Reasonable Person" Standard

1. Third Circuit Cases

In *United States v. Elonis*, defendant Anthony Elonis was prosecuted under 18 U.S.C. § 875(c) ("Section 875(c)")[109] for posting threatening messages on his Facebook page.[110] These posts referred to Elonis's estranged wife and an FBI agent who approached his home after monitoring his violent Internet posts.[111] The threatening posts at issue included references to rape, bestiality, guns, knives, high-caliber bullets, school shootings, mortar attacks on his wife's home, and other illegal acts and violent imagery, some of which were expressed as rap lyrics.[112] At trial, Elonis argued that *Black* and the First Amendment required a showing of subjective intent to threaten.[113] Despite his First Amendment challenges, a jury convicted Elonis under Section 875(c) for communicating threats using an instrument of interstate commerce.[114]

Prior to reviewing *Elonis*, the Third Circuit had adopted an objective test in *United States v. Kosma*.[115] The *Kosma* court addressed two questions: (1) whether the defendant possessed a general intent to make the allegedly threatening communication; and (2) whether a "reasonable speaker [in the defendant's position] would foresee the statement would be interpreted as a threat" without considering whether the speaker actually intended to threaten a target or actually believed that the statement would likely be interpreted as a threat.[116] On appeal, Elonis argued that the court's standard violated the First Amendment since *Black* clearly requires a finding of a subjective intent to threaten a specific target in order to support a conviction under Section 875(c).[117]

109. United States v. Elonis, 730 F.3d 321, 323 (3d Cir. 2013) *cert. granted*, 82 U.S.L.W. 3538 (U.S. Feb. 14, 2014) (No. 13-983). Section 875(c) makes it a crime to "transmit in interstate or foreign commerce any communication containing any threat . . . to injure the person of another." 18 U.S.C. § 875(c).

110. *Elonis*, 730 F.3d at 326–27.

111. *Id.* at 326.

112. *Id.* at 325–36.

113. *Id.* at 327.

114. *Id.*

115. United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991).

116. *Id.*

117. *Elonis*, 730 F.3d at 327.

The Third Circuit noted that Elonis had no prior history of listening to or writing rap lyrics, indicating that the lack of history of communicating through lyrics might be significant in the context of Internet posts.[118] Nevertheless, the court decided the case without analyzing the contextual implications of Elonis's choice of medium. The court instead analyzed the temporal context of the Facebook posts only to determine whether the conditional, vague, or reflective nature of some of Elonis's posts rendered them toothless, protected abstractions of his desire that others experience harm.[119] The Third Circuit thus failed to analyze the contextual importance of Elonis's chosen medium except to say that Internet communications are presumed to cover the full geographical reach of the Internet, thus satisfying the statute's "interstate commerce" requirement.[120] The court then held that "a careful reading of the requirements of [Section] 875(c), together with the definition from *Black*, does not, in [the Third Circuit's] opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement" under the First Amendment.[121]

The Third Circuit analyzed the contextual trappings of Internet threats more thoroughly in *United States v. Fullmer*.[122] The defendants in *Fullmer* were convicted under the Animal Enterprise Protection Act ("AEPA") and federal interstate anti-stalking statutes for posting protest messages to their organizational and personal websites.[123] They challenged the convictions on First Amendment grounds, arguing that the AEPA criminalized protected political coercion and that their actions did not amount to unprotected true threats.[124] The record contained hundreds of screenshots from websites controlled by the extreme organization Stop Huntingdon Animal Cruelty ("SHAC"), which was primarily concerned with frustrating research company Huntingdon Life Sciences' animal testing practices.[125] The websites at issue involved speech that ranged from abstract advocacy of violence to reports of SHAC's protests and resulting harms delivered upon its targets as a result of the protests.[126] Some of

118. *Id.* at 325.

119. *Id.* at 334. Specifically, the court found that, though Elonis did not specify a time and place at which the threatened harm would occur, "taken as a whole, a jury could have found [Elonis] was threatening to use explosives on officers who "[t]ry to enforce an Order" of protection that was granted to his wife." *Id.*

120. *Id.* at 335.

121. *Id.* at 330.

122. *See generally* United States v. Fullmer, 584 F.3d 132 (3d Cir. 2009).

123. *See id.* at 136.

124. *Id.* at 153.

125. *Id.* at 154.

126. *Id.* at 154–55.

SHAC's radical followers perpetrated significant physical harms upon their targets independently of any call to action by SHAC.[127]

In upholding the conviction, the Third Circuit applied a "reasonable speaker" standard to determine whether the website amounted to unprotected true threats. The court found that the links between SHAC's call for action and reports of successful attacks were linked directly to the threatening nature of posting targets' personal information.[128] The practice created a context in which a target named on SHAC's website could reasonably fear that the threats were real because of the pattern of communication.[129] The defendants in *Fullmer* created a record of past successes, and maintained it permanently and publicly on the Internet to instill fear into SHAC's future targets while exhibiting control over their Internet and real-life audiences.[130] These factors provided an ample basis for liability under the Third Circuit's objective reasonable speaker standard because the website was particularly robust and connected to the control of real-life threatening actors.[131]

In *United States v. Stock*,[132] decided approximately one month before *Elonis*, the Third Circuit again declined to address the subjective intent issue left in *Black*'s wake. The court relied on an objective test for true threats as viewed by a reasonable observer (not a reasonable speaker standard, which the court applied in *Elonis*), and reiterated its adherence to the decades-old *Kosma* decision.[133] Though *Stock* was decided primarily as a matter of statutory interpretation of Section 875(c) and specifically, the word "threat," the court indicated that Internet communications should be viewed in their "totality" to determine whether the message would be perceived as a true threat.[134] According to the court's reasonable-observer test, contextual factors in the analysis broadly include temporal, linguistic, and the *totality* of the surrounding factual circumstances related to the defendant's message.[135] The court, however, discussed at length the defendant's *subjective intent* and actual state of mind. The court focused on how the defendant's online posts, viewed in context, reinforced the

127. *Id.* at 153.

128. *Fullmer*, 584 F.3d at 164.

129. *Id.*

130. *Id.*

131. *Id.* at 156.

132. United States v. Stock, 728 F.3d 287 (3d Cir. 2013).

133. *Id.* at 293 n.5 (quoting United States v. Zavrel, 384 F.3d 130, 136 (3d Cir. 2004)) (stating the that the correct standard for a true threat is whether a "reasonable person hearing or reading the statement or receiving the communication would understand it as a serious expression of an intent to inflict injury").

134. *Id.* at 293 n.5.

135. *See id.* at 299 n.12.

perception that he maintained a specific intent to violently harm an unnamed target despite the temporally uncertain nature of his posts, which indicated past, present, and future intent to harm the target.[136] The court also relied substantially on linguistic evidence of the defendant's *actual* intent to support an objective interpretation that his statements were true threats despite the court's approach that requires merely that a reasonable recipient of the communication would find that the statement amounted to a true threat.[137]

The Third Circuit cases involving Internet threats illustrate inconsistencies that arise from applying a strained objective standard to the First Amendment true threats doctrine, which is meant to distinguish protected expressive purposes from true threats. Although the *Elonis* court did not discuss the inherent meaning of threats in an E-context, the *Stock* court's discussion of the speaker's state of mind and Internet speech patterns indicates that the Third Circuit considers the defendant's media usage and actual state of mind in applying the objective test. This is a true totality of the circumstances approach. The Third Circuit's purported treatment of context and intent further complicates factual inquiries into the defendant's intentions at the time when the defendant publishes the Internet message. For example, instructing a jury to disregard the defendant's specific intent to threaten, while simultaneously instructing the jury to consider evidence related to the defendant's construction of a website and his history of Internet or media use, complicates an already murky standard since the very notion of personal media usage involves profoundly subjective explanations for behaviors and intentions.

Though the Third Circuit's standard remains an iteration of objectivity, the court's heavy reliance on the defendant's mindset and awareness strongly indicates the application of a subjective-focused inquiry in its constitutional true threats analysis. In these cases, the defendants' Internet personas and Internet histories were highly relevant to whether or not a speaker or observer could reasonably foresee that an Internet message or

136. *Compare id.* at 300 (emphasis added) ("We believe that a jury could reasonably find, from his use of the present tense in the second sentence together with his description of his past conduct in the first sentence, that *Stock had not abandoned his prior intent, but that he still harbored a present intent* that he was unable to fulfill at that time.") *with* United States v. Musgrove 845 F. Supp. 2d 932 (E.D. Wis. 2011). In *Musgrove*, the defendant's Craigslist post referred to no person in particular but stated that a local mall would "make [da] news dis weekend again" [sic] and implied that the defendant would bring a Glock handgun to the mall to prove who "OWN[ed] dat mall" [sic]. *Id.* at 938. The court found that the defendant's statement was sufficient for a reasonable juror to find that the defendant would do something violent with the handgun at the mall the coming Saturday. *Id.* at 945.

137. *See Stock*, 728 F.3d at 300 ("[A] jury could reasonably find . . . that Stock had not abandoned his prior intent, but that he still harbored a present intent that he was unable to fulfill at that time.").

post would be considered a true threat. Nevertheless, in its most recent discussion of the issue in *Elonis*, the Third Circuit maintained that no language in *Black* affirmatively draws the defendant's state of mind into the true threats analysis.[138]

2. Tenth Circuit Cases

Two federal district courts, the District of Colorado and the Middle District of Alabama, located within the Tenth and Eleventh Circuits, respectively, seemingly have adopted an objective standard under the First Amendment analysis for true threats cases since *Black*.[139] These courts focused on a purely hypothetical objective observer of the circumstances, not on the mental state of a reasonable speaker or reasonable recipient of the threat. In each case, though the courts adopted similar standards, they analyzed the context with different concerns in mind and reached different conclusions with respect to public Internet media.

In *United States v. Wheeler*, the defendant (located in Italy) published on Facebook "instructions to kill law enforcement officers, politicians, judges, district attorneys, public defenders and their children" in violation of Section 875(c).[140] The defendant challenged the constitutionality of the statute under the First Amendment, arguing that the Facebook posts did not amount to unprotected true threats.[141] The district court distinguished the factual record in *Wheeler* from the political hyperbole in *Watts* based on the reactions of online message recipients and the Tenth Circuit's objective standard.[142] The *Wheeler* court then stated that two online observers' reports to authorities "show[ed] that a reasonable person could perceive Mr. Wheeler's posts as a true threat," regardless of whether other online recipients found humor or political jest in the posts.[143]

The *Wheeler* court's reliance on essentially a two-member Internet audience illustrates a limited view under an ostensibly objective reasonableness analysis of E-context. Furthermore, the *Wheeler* court did not make specific findings on the size of the Internet audience to distinguish the facts from *Watts*. In *Watts*, the size of the audience at the rally was known, rendering the immediate reach of the allegedly

138. United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted* 82 U.S.L.W. 3538 (U.S. June 16, 2014) (No. 13-983). ("[W]e find that *Black* does not alter our precedent.").

139. *See generally* United States v. Wheeler, No. 12–cr–0138–WJM, 2013 WL 1942213 at *3–5 (D. Colo. May 10, 2013); United States v. Carmichael, 326 F. Supp. 2d 1267, 1280–90 (M.D. Ala. 2004).

140. *Wheeler*, 2013 WL 1942213 at *1.

141. *Id.* at *3.

142. *Id.* at *5 (discussing the speech at issue in Watts v. United States, 394 U.S. 705 (1969) (per curiam)).

143. *Wheeler*, 2013 WL 1942213 at *5.

threatening communication both verifiable and finite.[144] Given the socially interconnected, and often public, nature of Facebook posts, their reach and impact in *Wheeler* are unclear. The *Wheeler* case indicates one court's willingness to use the reactions of a limited Internet audience as a proxy for a larger community of hypothetical reasonable recipients. This approach is not problematic in all cases, but presents serious challenges to Internet speakers who transmit communications to a number of individuals who may be familiar with the full context of the communication, the parties, or the defendant's propensity to use the Internet for intimidating purposes. The *Wheeler* court's consideration of speaker-focused contextual factors, such as the actual intent, may have impacted this analysis, but it nevertheless declined to discuss what effect, if any, the outcome of *Black* had on the analysis.[145]

Wheeler also failed to square with two recent, seemingly inconsistent Tenth Circuit cases. In *United States v. Wolff*, the Tenth Circuit defined a true threat as an objectively read "*declaration* of intention, purpose, design, goal, or determination to inflict punishment,"[146] a standard that traces back to the longstanding pre-*Black* decision, *United States v. Viefhaus*.[147] But *Viefhaus* did not necessarily solidify the intent standard in the Tenth Circuit, leaving room for discord in the standard.[148] In *United States v. Magleby*, the court seemingly ignored *Viefhaus* and held that a true threat must be made "*with the intent* of placing the victim in fear of bodily harm or death."[149] This holding marks an important shift in language that clearly evokes a specific intent requirement. The *Wheeler* court was aware of *Magleby*, citing it to support the holding that reasonableness is typically a question of fact for the jury, but the court did not consider *Magleby*'s holding or its impact on the true threats doctrine in the Tenth Circuit.[150] At a minimum, courts within the Tenth Circuit have seemingly refused to read *Magleby* as an alteration of its intent standard prior to *Black*, even though *Magleby* seemed to endorse the language of specific intent for true threats.

144. *See Watts*, 394 U.S. at 706.

145. *Wheeler*, 2013 WL 1942213, at *4.

146. United States v. Wolff, 370 F. App'x 888 (10th Cir. 2010) (quoting Nielander v. Bd. of Cnty. Comm'rs, 582 F.3d 1155, 1167 (10th Cir. 2009)) (emphasis added).

147. *Id.* at 892–93.

148. *See id.* at 892 ("It is the making of the threat and not the intention to carry out the threat that violates the law. . . . The trier of fact, therefore, must decide whether a 'reasonable person would find that a threat existed.'").

149. United States v. Magleby, 420 F. 3d 1136, 1139 (10th Cir. 2005) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)) (emphasis added).

150. *Wheeler*, 2013 WL 1942213, at *4.

Moreover, in *United States v. Dillard*, the District of Kansas (sitting in the Tenth Circuit) held fast to *Viefhaus*, finding that "[w]hat is required is simply the intentional sending of a communication, which the sender knows a reasonable recipient will take as a serious expression of violence."[151] Yet this "knowing" standard requires more than *Viefhaus*'s mere "objective declaration" standard. The "knowing" standard focuses on the speaker's knowledge rather than merely the objectively threatening reading of the communication.

The Tenth Circuit cases provide no clear explanation for why the recognized *Viefhaus* "objective declaration" standard would even allow the *Magleby* "made with intent" standard to encroach into the jurisprudence without some important doctrinal shift. Specifically, the *Wheeler* decision (applying an objective hypothetical reasonable person standard) and the *Dillard* decision (seemingly adopting a standard for requiring knowledge that the message is objectively threatening) portray confusion among courts within the Tenth Circuit in interpreting its own precedent for intent. As such, these cases help little to resolve the effect that *Black* had, if any, on the true threats doctrine in this circuit.

3. Eleventh Circuit Cases

In *United States v. Carmichael*, the United States District Court for the Middle District of Alabama (sitting in the United States Eleventh Circuit) also acknowledged post-*Black* that the Supreme Court had not settled on a single test for true threats cases.[152] The Eleventh Circuit has joined several other circuits, however, in finding that *Black* did not import a subjective intent requirement into the First Amendment true threats analysis.[153] In *Carmichael*, the defendant, who was charged with drug trafficking offenses, posted the identities of several informants on a website he created to gather information about the prosecution's case from the community.[154] The prosecution moved for a protective order requiring the defendant to shut down his website on the grounds that it constituted an unprotected true threat and the defendant challenged the motion on First Amendment grounds.[155] One informant testified that she was so fearful for her life that she left her home.[156] Another informant testified that the website changed his life and that he was scared to let his children outside.[157]

151. United States v. Dillard, 989 F. Supp. 2d 1169, 1178 (D. Kan. 2013).
152. United States v. Carmichael, 326 F. Supp. 2d 1267, 1280 (M.D. Ala. 2004).
153. *See* United States v. Martinez, 736 F.3d 981, 988 (11th Cir. 2013).
154. *Carmichael*, 326 F. Supp. 2d at 1281–82.
155. *Id.* at 1270.
156. *Id.* at 1289.
157. *Id.*

The district court in *Carmichael* found that, despite commentators' and courts' assertions to the contrary, the technological functions of the Internet do not require Internet communications to take on greater or lesser constitutional restriction than "more traditional media."[158] Taking a more liberal view of the Internet as a public forum, the court found that, in general, "the case law is that speech that is broadcast to a broad audience is less likely to be a 'true threat,' not more [likely to be a true threat]."[159] Moreover, the evidence of several particularly vulnerable informants, the recollection of the history of harm directed toward informants in criminal court cases, and witnesses' testimony related to their perceived meanings of the Internet posts, did not support the objective finding of a true threat.[160] The *Carmichael* court refused to accept the government's argument that the website brought to mind past cases of harm to informants, and also refused to look beyond the website itself and assess the defendant's use of the Internet to build the contextual analysis.[161]

Under the objective reasonable person standard articulated by the federal district courts in *Wheeler* and *Carmichael*, neither of which was appealed, the courts took sharply divergent views of the evidence regarding an Internet threat's actual and objectively reasonable impact on the audience as a matter of law. Fact-intensive and context-dependent true threats prosecutions are subject to radically different outcomes regarding the question of the impact of the Internet. These cases demonstrate that Internet threats cases have defied bright-line rules and led to the conclusion that defendants who target a specific audience on the Internet by name and personal information have enjoyed greater protection than defendants who happen to frighten anonymous and untargeted readers of the defendants' social media accounts.

Evidence related to an individual's particular purpose is relevant to determining the reasonableness of the impact on intended and unintended recipients of threats. For example, in *New York ex rel Spitzer v. Cain*, the State Attorney General of New York brought a suit for injunctive relief against defendants under the federal Freedom of Access to Clinic Entrances

158. *Id.* (citing Reno v. ACLU, 521 U.S. 844, 870 (1997)).

159. *Id.* at 1289 (quoting United States v. Bellrichard, 994 F.2d 1318, 1321 (8th Cir. 1993)).

160. *Id.*

161. *See id.* at 1285 (internal citation omitted) ("Nevertheless, it is important to recall that the inquiry here is whether a reasonable person would view Carmichael's website as 'a serious expression of an intention to inflict bodily harm,' not whether the site calls to mind other cases in which harm has come to government informants, not whether it would be reasonable to think that Carmichael would threaten an informant, and not whether Carmichael himself is somehow threatening. Context can help explain the website's meaning, but it is the website that is the focus of the court's inquiry. Although the broad social context makes the case closer, the background facts described above are too general to make the Carmichael case site a 'true threat.'").

Act, and analogous New York laws that protect patients' access to abortion clinics.[162] The only Internet-related component of the case involved the defendants recording the license plate numbers from targets' cars with the supposed intent to post them or track clinic employees.[163] Nevertheless, the court indicated that a speaker's conduct itself could indicate a violent purpose, and determinations of purpose were relevant to the objective analysis for unprotected true threats under the First Amendment.[164]

B. The Reasonable Recipient Standard Iteration of the Objective Test

A number of federal circuits have adopted an objective standard that tests whether a reasonable recipient of the communication would find that the communication amounts to a true threat.[165] Those courts tend to rely on the landmark cross-burning case *R.A.V. v. St. Paul*, in which the United States Supreme Court proclaimed that the true threats doctrine is intended to "protect individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."[166] *R.A.V.* lies outside the scope of this article, but the federal circuits' articulation of the purpose of the true threats doctrine is highly germane to the analysis of Internet threats. The objective reasonable recipient standard directs courts to the relationship between the factual circumstances surrounding the threat, the defendant's control over the means of carrying out the threat, and the recipient's susceptibility to targeted harm.

1. Eighth Circuit Cases

United States v. Amaya,[167] a recent decision of the United States District Court for the Northern District of Iowa (sitting in the Eighth Circuit), illustrates the importance of the defendant's subjective intent

162. New York ex rel Spitzer v. Cain, 418 F. Supp. 2d 457, 460 (S.D.N.Y. 2006). The defendants unsuccessfully challenged the application of the federal and state laws on a First Amendment theory that their actions failed to qualify as unprotected true threats. *See id.* at 490 (stating that "nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate rights under the First Amendment of the United States Constitution").

163. *Id.* at 477.

164. *Id.*; *see also* Brayshaw v. City of Tallahassee, 709 F. Supp. 2d 1244, 1248 (N.D. Fla. 2010) (striking down a statute that outlawed posting personal information about a law enforcement officer with the intent to intimidate the officer after a facial constitutional challenge, because, absent some credible threatening context (either historical or current) that communicates a violent meaning, the communication cannot qualify as a true threat).

165. *See* United States v. Elonis, 730 F.3d 321, 329 & n.5 (3d Cir. 2013); *see also* United States v. Jeffries 629 F.3d 473, 480–81 (6th Cir. 2013).

166. *Elonis*, 730 F.3d at 329 (citing R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992)).

167. United States v. Amaya, 949 F. Supp. 2d 895 (N.D. Iowa 2013).

when analyzing the contextual totality of threatening communications. The Eighth Circuit, both pre-*Black* and post-*Black*, has affirmed a reasonable recipient iteration of the objective standard.[168] The *Amaya* court found that the defendant lacked the requisite intent to threaten under the First Amendment to sustain an enhanced sentence for obstruction of justice in the defendant's drug-related prosecution.[169] In *Amaya*, the defendant, an alleged drug trafficker, posted the prosecution's witness list on Facebook as a "snitch list," which carried a historically threatening connotation.[170] Nevertheless, the court found that the defendant "never intended" to threaten any named witness on the list.[171] The court emphasized that the defendant never targeted his public Facebook post toward a person on the list.[172] This emphasis indicates the importance of an individual's approach to an Internet audience, even in a jurisdiction that adopts an objective standard for true threats.[173] In light of the immense diversion in the intent standard for true threats cases, *Amaya* is problematic. The *Amaya* court recited a litany of facts related to the defendant's subjective intent, willful conduct, and state of mind, even though the true threats jurisprudence in the Eighth Circuit has expressly rejected the subjective intent requirement both pre and post-*Black*. Such overlapping analyses fail to promote clarity in either the First Amendment true threats doctrine or the appropriate treatment of public Internet communications under an objective reasonable person analysis.

2. Second Circuit Cases

Two other highly publicized federal circuit court cases illustrate the importance of the defendant's control over notoriously violent or radical groups and the context created by Internet communications that call for members of such groups to harm others. For example, *United States v. Turner*, a recent decision involving the conviction of shock radio show host Harold "Hal" Turner under 18 U.S.C. § 115(a)(1)(B), which makes it a

168. *See* United States v. Beale, 620 F.3d 856 (8th Cir. 2010). *Beale* involved direct e-mail communications and thus did not fit the search parameters for this article. Nevertheless, both *Beale* and *Amaya* rely on the pre-*Black* decision, Doe v. Pulaski County Special School District, 306 F. 3d 616 (8th Cir. 2002). Notably, the *Amaya* court's recitation of the facts revolve primarily around the specific intent and conduct on behalf of the defendant. *See generally* United States v. Amaya, 949 F. Supp. 2d 895, 908 (N.D. Iowa 2013).

169. *Id.* at 911–12.

170. *Id.* at 908.

171. *Id.* at 911.

172. *Id.*

173. *Id.* at 910 (stating that the Eighth Circuit adopts an objective reasonable recipient standard). For discussion of a similar standard adopted in other circuits, *see infra* Part IV.B.2–4.

crime to threaten harm to a federal judge.[174] Turner stated in his blog posts that three Seventh Circuit judges deserved to be killed, and compared them to United States District Court Judge Lefkow, whose husband and mother were murdered following a highly publicized ruling against a World Church of the Creator leader.[175] Turner later published blog posts that contained personal information about the judges.[176] He also implied a causal connection between the Lefkow murders, of which the Seventh Circuit judges were personally aware,[177] and Turner's public calls for retribution against Lefkow herself.[178]

The Second Circuit, under its objective test, held that a reasonable recipient of Turner's communications could conclude that the messages contained a true threat, particularly given that he "publicly implied a causal connection between [his] call for judges' deaths and actual murders."[179] While acknowledging that syntax and other contextual factors could mitigate against a finding of an unprotected true threat, the court noted that the speech at issue communicated a clear intent to interfere with the judges' duties by evoking the recent murder of their colleague's family and by publicly boasting that "public display of address information is 'an effective way' to instill fear in the target."[180] The court mentioned in dicta that Turner's statements qualified as unprotected true threats under both an objective and subjective standards, though the First Amendment intent issue was not reached because the defendant challenged his conviction primarily on a First Amendment political speech distinction.[181]

The Second Circuit has yet to find an occasion to reexamine its objective standard raised in *Turner*.[182] But the district court in *New York ex rel Spitzer v. Cain*, sitting in the Second Circuit, indicated prior to *Turner* that the defendant's particular, subjective purpose was relevant to determining whether a reasonable person would consider conduct or communications to be an unprotected true threat. Moreover, the *Turner* court's emphasis on the defendant's specific intent supports the

174. United States v. Turner 720 F.3d 411, 413 (2d Cir. 2013).

175. *Id.* at 415.

176. *Id.* These posts included the judges' "photographs, work addresses, and room numbers for each of the three judges, along with a map indicating the location of the courthouse in which they worked, and a photograph of the building modified to point out 'Anti-truck bomb barriers.'" *Id.* at 414.

177. *Id.* at 416.

178. *Id.* at 422.

179. *Turner*, 720 F.3d at 422.

180. *Id.* at 423.

181. *Id.* at 420 n.4.

182. *Id.*

consideration of the speaker's particular purpose even under an objective analysis.

3. Fourth Circuit Cases

In *United States v. White*,[183] white supremacist leader William White was convicted under Section 875(c) following a series of direct e-mail communications with, and blog posts about, a Canadian civil rights attorney Richard Warman; and for repeatedly calling and sending emails to a Citibank employee Jennifer Petsche.[184] White posted stories recounting a neo-Nazi group's firebombing of a Canadian civil rights activist's home followed by a call for others to "do it to Warman."[185] The Fourth Circuit held that White's e-mail to Petsche amounted to an unprotected true threat because of the implied causal connection with other heinous violent events and White's apparent control over the means of consummating the threat.[186] The court, however, held that the public calls for violence against Warman amounted to protected political hyperbole because the prosecution could not prove that White controlled dangerous members of the audience.[187] The government argued that White's posts created a violent atmosphere, and the district court acknowledged that the posts reached a substantial number of like-minded white supremacists.[188] Nevertheless, the Fourth Circuit concluded that White did not make the statements to a defined group over which he exercised any meaningful control.[189] The court distinguished between "a *serious desire* that Warman be harmed by others [and] a *serious expression of intent* to do harm from the perspective of a reasonable recipient."[190]

In a similar case involving a motion for sanctions against White, a federal district court sitting in the Fourth Circuit held in 2013 that plaintiffs in a Fair Housing Act suit could not impose sanctions against White based on his hate-motivated public Internet posts.[191] The court reasoned that the posts could not be meaningfully distinguished from those directed toward the general public and were akin to abstract advocacy.[192] Despite White's

183. United States v. White, 670 F.3d 498, 512 (4th Cir. 2012).

184. *Id.* at 501, 505–06.

185. *Id.* at 505.

186. *Id.* at 512.

187. *Id.* at 513.

188. United States v. White, No. 7:08-CR-00054, 2010 WL 438088 at *13 (W.D. Va. Feb. 4, 2010) (stating that White's postings more likely resembled crude methods of stating a political statement similar to Watts rather than true threats).

189. *White*, 670 F.3d at 513.

190. *Id.* at 514 (emphasis in original).

191. In re White 2013, No. 2:07CV342, 2013 WL 5295652, at *59 (E.D. Va. Sept. 13, 2013).

192. *Id.*

history of boasting about the impact his public speeches had on his followers' violent acts against certain targets, and his direct communication with the housing plaintiffs, the court held that his messages failed to unequivocally communicate that his followers would carry out acts of violence.[193] The Fourth Circuit's holding in *In re White* thus suggests that although a direct communication is not required to support a finding of a true threat,[194] an implied or actual causal connection communicated by the speaker is likely to support such a finding.

Turner and *White* illustrate additional circuit splits on the appropriate standard for intent in true threats cases. On similar facts related to publicly available Internet posts, the *White* court in the Fourth Circuit found that public statements linking past violent events to a current target did not support a finding of a true threat.[195] On the other hand, the *Turner* court in the Second Circuit found that a similar politically charged wish for the deaths of three judges could support a conviction based on a true threat analysis.[196] In both cases, the factual circumstances lacked a provable causal connection between the speaker and the means of delivering violence. Both cases, however, also fell against a backdrop of violent political rhetoric and seemingly powerful, though pompous, extremist speakers. The facts of these cases also indicated that the speakers sincerely desired that the targets suffer serious bodily injury or death, and the targets in both cases testified that they feared sincerely for their lives. The divergence in analysis, however, turned on whether the speaker impliedly or actually commanded the actions of other violent actors who would harm the targets of the threatening messages. The Fourth Circuit in *White* admitted that no evidence existed to determine whether the audience took White's statements about his hopes for Warman's death for a joke, but assumed that the group of like-minded individuals would understand White's message as primarily political.[197] *White* and *Turner* also featured sharp dissents (discussed in Part IV.D. below) in which the dissenting judges criticized the majority approach to analyzing the contextual significance of the Internet as a public forum and the purpose of the defendant in determining the gravity of threats in Internet spaces.[198]

193. *Id.*
194. *White*, 670 F.3d at 513.
195. *Id.*
196. United States v. Turner 720 F.3d 411, 422 (2d Cir. 2013).
197. *White*, 670 F.3d at 513.
198. *See infra* Part IV.D.

4. Sixth Circuit Cases

In *United States v. Jeffries*, the Sixth Circuit considered the audience and the reach of Internet communication in a true threats analysis.[199] There, the defendant was convicted under Section 875(c), for posting a music video on YouTube in which the defendant himself sings an original song with threatening language directed at the judge who presided over his child custody matter.[200] The YouTube video was not delivered to the judge by the defendant, but by a third party.[201] In denying the defendant's First Amendment challenge, the Sixth Circuit held that Section 875(c) prohibits any communication containing a true threat regardless of whether the defendant subjectively intended to threaten the target or whether the communication even reached the intended target, so long as a reasonable observer would construe the communication to be a true threat.[202] According to the Sixth Circuit, a relevant observer is any person to whom the threatening communication is delivered once the communication is uttered.[203]

The Sixth Circuit also addressed the contextual issues raised by the defendant's history of online activity. Like the Fourth Circuit in *White*, the *Jeffries* court found that the defendant's self-styled online persona was temporally and contextually separate from the relevant context of the allegedly threatening post.[204] Moreover, the defendant's lone allegedly threatening music video established enough context for the jury to reasonably conclude that his speech amounted to an unprotected true threat.[205] Although the defendant purportedly expressed his humorous side by posting hokey music videos to YouTube in the weeks leading up to his allegedly threatening post, the Sixth Circuit ruled that this material may be properly excluded from the contextual analysis.[206] The Sixth Circuit limited the scope of E-context to the communication itself and to other Facebook communications that directly followed the video's distribution.[207] A federal district court sitting in the District of Columbia Circuit has recently adopted a similar approach, though the circuit has yet to squarely

199. United States v. Jeffries, 692 F.3d 473 (6th Cir. 2013), *cert. denied* 82 U.S.L.W. 3178 (U.S. Oct. 7, 2013) (No. 12-1185).

200. *Id.* at 481.

201. *Id.* at 477.

202. *Id.* at 482.

203. *Id.* at 482–83.

204. *Id.* at 483.

205. *Jeffries*, 692 F.3d 483.

206. *Id.*

207. *Id.* at 482.

address the intent issue since *Black*.[208] The contextual limits of a defendant's Internet history and personality are thus unclear among the circuits.

The Sixth Circuit, like other circuits that adopt an objective standard, has relied on *R.A.V. v. St. Paul*,[209] to support the constitutional premise that true threats may be restricted consistent with the First Amendment to protect recipients from the harms caused by their very utterance.[210] This synthesis of such constitutional bulwarks broadens the rationale underlying the First Amendment true threats doctrine, and potentially does so problematically. By equating recipients of threats with targets of threats under the same objective standard in situations involving the open-access Internet forums and social networks, the true threats doctrine becomes unwieldy in expanding *R.A.V.* to protect potentially any Internet user. While the recipient of a direct communication of a threat to harm another may suffer some significant psychological or emotional harm, to presume as a matter of law that a passive Facebook user or Internet forum participant would suffer the same harm as an intended target is problematic under the Sixth Circuit's definition of "recipient." In light of the blended objective and subjective inquiries employed in some "objective standard" circuits,[211] the Ninth Circuit Court of Appeals has affirmed a reading of *Black* that requires subjective intent to be read into all statutes that criminalize pure speech as true threats, in addition to any objective requirements imposed by the statute.[212]

C. Examining E-Context Under the Subjective Test for True Threats

The United States Court of Appeals for the Ninth Circuit, one of the most influential federal circuit courts, has consistently rejected the purely objective standard, finding that it is constitutionally insufficient under the First Amendment to base a conviction solely on a jury determination of whether a reasonable observer would perceive a communication as a true

208. In re Grand Jury Subpoena No. 11116275, 846 F. Supp. 2d 1, 8 (D.D.C. 2012) (stating that "while the statement appears within a larger group of preposterous tweets, this does not automatically render the threat toothless," and separating the allegedly threatening Twitter post that amounted to a "prima facie threat" from an array of related but distinct attempts at humor). The court in *In re Grand Jury Subpoena* further questioned the constitutionality and usefulness of the First Amendment objective intent standard employed by a majority of the circuits, particularly in the context of anonymous Internet threats cases. *Id.* at 7.

209. R.A.V. v. St. Paul, 505 U.S. 377 (1992).

210. United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2013) *cert. denied* 82 U.S.L.W. 3178 (U.S. Oct. 7, 2013) (No. 12-1185) (citing R.A.V., 505 U.S. at 388. and Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (equating true threats with fighting words).

211. *See supra* Part II.A.

212. United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011).

threat.[213] *United States v. Bagdasarian* is the Ninth Circuit's most recent decision on the true threats doctrine, in which the court affirmed the use of a subjective intent test under the First Amendment in addition to an objective test.[214]

In *Bagdasarian*, the defendant was convicted in federal district court under 18 U.S.C. § 879 ("Section 879")[215] for threatening to kill President Barack Obama during his 2008 candidacy for President of the United States, and appealed on the grounds that the evidence at trial was insufficient to uphold his conviction.[216] Under an online pseudonym, Bagdasarian posted statements to the American International Group Yahoo! Finance message board that included references to .50 caliber ammunition and racism-laden wishes for someone to shoot President Obama.[217] In overturning the conviction, Ninth Circuit strongly stated that *Black* requires courts to analyze the subjective intent of the speaker in prosecutions under all threats statutes.[218] The court then determined that the online posts failed to express a subjective intent to threaten President Obama because they neither indicated that the defendant would consummate the threat, nor did they suggest that the defendant controlled any means of carrying out the threat, providing a layer of First Amendment protection.[219] The court also concluded under the objective elements of Section 879 that the defendant's anonymity on the Yahoo! Finance message board was any more or less likely to contribute to the objective finding of an unprotected threat.[220] The dissent, in accord with the District of Columbia Circuit (which has yet to rule on whether the *Black* decision requires both an objective and subjective test to true threats statutes),[221]

213. *Id.* at 1116.

214. *Id.* at 1117–18 (stating that a subjective analysis must accompany an objective analysis even when the statute calls only for an objective determination of a true threat).

215. 18 U.S.C. § 879 (2000).

216. *Bagdasarian*, 652 F.3d at 1113–15.

217. *Id.* at 1115.

218. *Id.* at 1117.

219. *Id.* at 1122–23.

220. *Id.* at 1120.

221. *See* In re Grand Jury Subpoena No. 11116275, 846 F. Supp. 2d 1, 5–6 (D.D.C. 2012) (citing *Bagdasarian*, 652 F.3d at 1117). In *In re Grand Jury Subpoena*, the court discussed the true threats doctrine in the context of a motion to quash a grand jury subpoena that sought to compel Twitter to reveal the identity of the defendant. *Id.* at 2. The court stated that anonymity on the Internet "introduces an element of ambiguity that renders an assessment of the threat's legitimacy difficult." *Id.* at 6. Because this proceeding involved a motion to quash a subpoena and not a motion to quash an indictment, the court did not rule on whether or not the Twitter posts amounted to a true threat as a matter of law. *See id.*

found the issue of anonymity to be problematic to the objective contextual analysis.[222]

Furthermore, the majority in *Bagdasarian* stated that the financial character of the message board would be more likely "to blunt any perception that statements made there were serious expressions of intended violence."[223] The court also reasoned that the fact that only one message board user reported Bagdasarian weighed against finding that a reasonable person would read the defendant's statements as a true threat.[224] This rationale comports with the Middle District of Alabama in *Carmichael*, and contrasts with the reasoning employed by the District of Colorado in *Wheeler*.[225]

The Ninth Circuit also distinguished the facts of *Bagdasarian* from its pre-*Black* decision in *Planned Parenthood v. American Coalition of Life Activists* on the grounds that Bagdasarian's posts revealed no connection, either implicit or actual, to any pattern of behavior which typically could lead to harm to named targets following Internet communications.[226] *Bagdasarian* suggests that, absent directly threatening language or factual context indicating that the defendant controls and plans to use certain means to carry out a threat, the Ninth Circuit will likely hold true threats to a strict subjective standard. In the court's view, applying a subjective intent standard to true threats cases cures potential errors caused by inadequate jury instructions or a statutory reading that clearly articulates only an objective standard.[227]

Both the majority and the dissent in *Bagdasarian* acknowledged that anonymous Internet threats might be more threatening in some circumstances.[228] But the dissent took a more protective position that considered the "country's collective experience" around the time of the defendant's communications and the memories of Internet threats that presaged tragic events, such as mass shootings.[229] The dissent argued that the majority relied too heavily on the context of the forum, and failed to

222. *Bagdasarian*, 652 F.3d at 1120–21.

223. *Id.* at 1121.

224. *Id.*

225. *Compare id. with* United States v. Wheeler, No. 12-cr-0138-WJM, 2013 WL 1942213, at *4 (D. Colo. May 10, 2013) (finding that the impact on specific message recipients was highly relevant to the objective reasonableness of the true threat interpretation), *and* United States v. Carmichael, 326 F. Supp. 2d 1267, 1280 (M.D. Ala. 2004) (finding that the impact on the targets of the message, a DEA agent and several informants, did not necessarily support the finding of an objectively construed true threat).

226. *Bagdasarian*, 652 F.3d at 1119 n.19.

227. *See also* United States v. Sutcliffe, 505 F.3d 944, 962 (9th Cir. 2007).

228. *Bagdasarian*, 652 F.3d at 1120 n.20 (Wardlaw, J., dissenting in part).

229. *Id.* at 1126.

properly consider the defendant's violent communications in a broader factual context related to the use of the Internet to threaten impending harms to others.[230] The dissent emphasized that the defendant's statements should be read separate and apart from the surrounding non-violent Internet discussions on the forum.[231] Additionally, the defendant's specific use of the Internet forum permitted him to "hide behind his [screen name's] cloak of anonymity with the hope, one can infer, that he would not be found out."[232] According to the dissent, these facts supported a finding that the defendant subjectively intended to threaten President Obama and that a reasonable recipient could reach the conclusion that the defendant's comments caused harm that fell outside the First Amendment protection.[233]

D. The Dissenting Approaches and New Territory for Analysis of E-Context

The Ninth Circuit's response to *Virginia v. Black* drew the attention of would-be dissenting judges in jurisdictions that apply purely objective tests to the true threats doctrine even when the litigants did not request reversal of precedent on the intent issue.[234] For example, in *United States v. Turner*, Second Circuit Judge Pooler dissented on the grounds that the defendant's speech constituted protected violent advocacy rather than an unprotected true threat.[235] Although Judge Pooler took no position on whether *Black* altered the Second Circuit's true threats analysis, she concluded that when speech is ambiguous, the distinction between public and private discourse becomes highly relevant to the impact of the threat.[236] She also stated that ample precedent from the Second Circuit and other circuits suggested that courts should analyze threatening but ambiguous public speech as incitement and not as a true threat.[237] Judge Pooler's dissent suggests that distinctions between Internet threats and protected online advocacy "does not turn on the gravity of the speech" but on its form.[238] Despite her dissent and other circuit courts' post-*Black* adoption of the subjective standard under the First Amendment, the Second Circuit was not prepared to depart from its precedent.[239]

230. *Id.* at 1125–27.
231. *Id.* at 1128.
232. *Id.* at 1131.
233. *Id.*
234. United States v. Turner, 720 F.3d 411, 420 n.4 (2d Cir. 2013).
235. *Id.* at 429–30 (Pooler, J., dissenting).
236. *Id.* at 432–33.
237. *Id.* at 433.
238. *Id.* at 434.
239. *Id.*

Taking a firmer dissenting position in *United States v. White*, Fourth Circuit Judge Floyd argued that *Black* effected a shift in the First Amendment standard for determining intent in true threats cases, even if *Black*'s explicit language lacked a clear intent to abrogate the objective intent (only) standard used by the majority of circuits.[240] Taking the Ninth Circuit's lead, and comporting his reasoning with established legal scholarship on the true threats doctrine, Judge Floyd concluded that the Court in *Black* adopted the ordinary meaning of the term "threaten" and argued that intent to threaten is "[an absolutely necessary component] of a constitutionally punishable threat" under the First Amendment[241] that helps courts to avoid stumbling into applying a constitutionally impermissible negligence standard to criminal cases.[242]

Similarly, Sixth Circuit Judge Sutton, the author of the majority opinion in *Jeffries*, wrote separately in a *dubitante* opinion[243] to address his foundational concerns surrounding the purely objective standard adopted by the Sixth Circuit. Like Judge Floyd in his *White* dissent, Judge Sutton argued that the ordinary dictionary definition of the word "threat," and Congress's discussion of Section 875 in committee (both strangely absent from other true threats decisions) compel a dual standard that analyzes both the objectively reasonable impact and the subjectively intended purpose of the allegedly threatening communication.[244] Judge Floyd's and Judge Sutton's dissenting and *dubitante* opinions, respectively, indicate a trend toward broadening the contextual landscape of the true threats doctrine to build a more speech-protective analysis for Internet speech. By operating upon the premise that the government should avoid chilling core political speech, courts may be poised to adopt a dual standard for true threats following *Black*.

V. Conclusion

The modern Internet environment is becoming increasingly public and networked, and courts in the federal circuits appear to be taking notice. Internet-mediated communications occupy substantial public space, and

240. United States v. White, 670 F.3d 498, 522 (4th Cir. 2013) (Floyd, J., dissenting).

241. *Id.* at 523.

242. *Id.* at 524 (citing Crane, *supra* note 63, at 1271–72).

243. A *dubitante* opinion expresses doubt regarding a legal premise or the particular rationale of a decision without going so far as to declare the decision wrong. In *Jeffries*, Judge Sutton wrote separately to question whether the Sixth Circuit had been interpreting Section 875 correctly from the outset, rather than to cast doubt on the court's interpretation of Sixth Circuit precedent. *See* United States v. Jeffries, 692 F.3d 473, 485 (6th Cir. 2013) (Sutton, J., *dubitante*), *cert. denied* 82 U.S.L.W. 3178 (U.S. Oct. 7, 2013) (No. 12-1185).

244. *Id.*

Internet-mediated threats occupy the public consciousness.[245] Thus far, the Internet's particular technological qualities have not served as grounds upon which to treat the Internet differently from other mass communication or broadcast technologies.[246] Nevertheless, some judges have embraced relevant legal scholarship that supports distinctions for Internet speech based on the medium's public, pervasive, and personal characteristics.[247]

Federal courts remain split on whether they should analyze the contextual elements of threatening communications according to the speaker's subjective communicative intent. The courts also exhibit a significant lack of uniformity regarding the importance of whether an allegedly threatening communication actually causes the target or some recipient to experience fear that the individual will sustain bodily injury or death. Some courts, including the Fourth Circuit in *White*, emphasize the relationship between the speaker, the speaker's control over the audience, and harm to the target under an objective standard. These courts view true threats determinations as particularly problematic when the messages cause psychological harm and are linked to the real world only by the speaker's reference.[248] The fragmented treatment of the intent standards leaves open divergent, but constitutionally permissible, applications of the true threats doctrine to the Internet's peculiar qualities in cases of Internet threats. A purely objective analysis under the true threats doctrine enables courts to come to drastically different conclusions regarding the effect that an allegedly threatening message actually has on the audience.[249]

Research grounded in social semiotics as applied to modes of communication frequently used for threatening speech supports the conclusion that the Supreme Court's forthcoming reexamination of the First Amendment true threats doctrine in *Elonis v. United States* may soundly account for the particular social impacts of speech in permanent and freely accessible Internet spaces.[250] An inquiry that blends the subjective and objective analyses for the purposes of determining a true threat will allow lower courts to develop further inquiry into the purpose

245. United States v. Bagdasarian, 652 F.3d 1113, 1126 (9th Cir. 2011) (Wardlaw, J., dissenting in part).

246. *See* Reno v. ACLU, 521 U.S. 844, 863 (1997).

247. *See White*, 670 F.3d at 524–25 (Floyd, J., dissenting in part); *see also Bagdasarian*, 652 F.3d 1125–29 (Wardlaw, J., dissenting in part).

248. *See, e.g.*, *White*, 670 F.3d at 513.

249. *Compare* United States v. Wheeler, No. 12-cr-0138-WJM, 2013 WL 1942213 at *7 (D. Colo. May 10, 2013) (finding that two complaints to law enforcement indicated that an objective reasonable person would consider the communication to be a true threat), *with Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (finding that a single complaint to law enforcement did not indicate that the defendant's language met the objective test for a true threat).

250. *See* Strauss, *supra* note 80, at 256.

underlying the defendant's communication. Nevertheless, no fewer than three federal courts have concluded that this hybrid analysis qualifies as a relevant inquiry for determining whether a threat truly communicates the sort of harm against which the true threats doctrine is designed to protect.[251] A subjective intent standard, coupled with existing constitutional and statutorily defined objective standards, promotes a prosecutorial framework that will explore the meaningful aspects of a defendant's online persona and behaviors.[252] Such aspects include the defendant's past history of consummated criminal acts arising out of prior threats by himself or others,[253] or the breadth of his online audience of followers,[254] all of which tend to add meaningful context to otherwise context-free communications posted on the Internet.

Moreover, a constitutional test for determining true threats should allow room for all relevant "contextual factors necessary to decide whether a particular [act] is intended to intimidate,"[255] including a defendant's particular usage of technology for an expressive purpose. Such a totality of the circumstances inquiry promotes complete factual analysis of the entire ecosystem of communication (i.e., speaker, medium, content, social context, target, and other recipients). It also comports with the Supreme Court's goal in *Black*—to ferret out proscribable intimidation and separate it from protected violent rhetoric. This approach also maintains the speech-protective, First Amendment spirit of *Watts*, which is grounded in viewing all speech in its full physical, social, political, and communicative context in order to determine the level of constitutional protection.[256]

The Supreme Court now stands on the cusp of deciding *Elonis*, which heavily implicates the First Amendment concerns with the defendant's subjective state of mind and the cultural context surrounding potentially threatening messages.[257] The Thomas Jefferson Center for the Protection of Free Expression, the Marion B. Brechner First Amendment Project, and

251. *See, e.g.*, New York ex rel Spitzer v. Cain, 418 F. Supp. 2d 457 (S.D.N.Y. 2006); United States v. Turner, 720 F. 3d 411 (2d Cir. 2013); *see also supra* Part V.A.3.

252. *See* United States v. Jeffries, 692 F.3d 473, 482–83 (6th Cir. 2013) (discussing the defendant's online presence, including his Facebook posts, and his use of YouTube to post humorous videos).

253. *Compare Turner*, 720 F.3d at 428 (construing as a true threat the defendant's references to prior acts of violence following his call for retribution against a federal judge), *with White*, 670 F.3d at 513 (construing as protect abstract advocacy the defendant's call for a firebombing of a civil rights lawyer's home by fellow white supremacists).

254. *See White*, 670 F.3d at 513.

255. *See* Virginia v. Black, 538 U.S. 343, 367 (2003).

256. *See* Watts v. United States, 394 U.S. 705, 708 (1969) (emphasizing the full context of the communication, including the reaction of listeners).

257. United States v. Elonis, 730 F.3d 321 (3d Cir. 2013) *cert. granted*, 82 U.S.L.W. 3538 (U.S. June 16, 2014) (No. 13-983).

the Pennsylvania Center for the First Amendment jointly filed a brief in support of Elonis's petition for certiorari as *amici curiae*.[258] They argued that the *Elonis* presented an "ideal opportunity for the [Court] to determine whether its current true threats doctrine is compatible with contemporary modes of communication." The brief emphasizes that social networks and Internet forums invite increasingly problematic applications of the true threats doctrine established in *Watts*. Allegedly threatening communications through social media are able to reach unintended and innumerable recipients at the "blink of an eye" even when the original speaker never intends that certain recipients receive the communications.[259] Because some speakers cannot control the distribution of such messages, violent speech can reach notoriously dangerous like-minded groups, as well as the Internet version of passersby who, without the benefit of context, may legitimately fear that a dangerous true threat has been communicated. In this respect, the speaker's state of mind is highly relevant to determining whether a proscribable harmful act has occurred. Rather than relying on a purely objective reading of a potentially decontextualized Internet message, courts should adopt a First Amendment test that focuses on identifying the harmful intent in the speaker's expression or the knowledge of a harmful impact on the likely recipient. Such a test would more appropriately protect cathartic and self-centered expressions that happen to include violent imagery that holds significance to the speaker's expressive purposes. Neither *Watts* nor *Black* yielded a consistent approach to the intent standard or the treatment of the communication's full context. As such, the Supreme Court's forthcoming review of *Elonis* should clarify *Black* and set a pivot point for the future of violent, yet cathartic, speech on the Internet.

In clarifying Justice O'Connor's "means to communicate" language in *Black*, the Court in *Elonis* may raise profound ancillary questions about how Facebook and other social media either facilitate or cloud the non-threatening meanings intended by certain speakers who use social media platforms for catharsis. The Court may also explain the standard required under *Watts* and *Black* in making a constitutional inquiry into all of the "relevant contextual factors" in a true threats case. If the Court adopts a subjective intent standard to all true threats statutes, then a defendant's fondness for another rapper's controversial lyrics[260] or his interest in

258. Brief for Jefferson Center for the Protection of Free Expression et al. as Amici Curiae Supporting Petitioner Elonis, United States v. Elonis, 730 F.3d 321, 2014 WL 4298029 (No. 13-983).

259. *Id.* at *5.

265. Petition for Writ of Certiorari at *5, *Elonis*, 730 F.3d 321, 2014 WL 645438 (No. 13-983) (describing Elonis's testimony that his rap lyrics were heavily influenced by the work of rapper Eminem).

quoting antiestablishment comedy sketches will become highly relevant to the jury's assessment of guilt. Moreover, juries would be required to at least consider admissible evidence related to the defendant's specific references to cultural tropes, such as gangster rap that frequently evoke violent imagery for expressive, artistic purposes. If the Court follows the majority of the federal circuits and upholds the objective reasonable person standard as the only requirement under *Black*, then it would signal to speakers that, in open Internet forums, such Facebook, the speaker bears the responsibility for all reasonable interpretations of their incendiary posts, regardless of whether the speaker actually intended to threaten. In this respect, the Court's decision in *Elonis* will either allocate additional social responsibility or provide additional communicative freedom to online speakers.

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